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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re	)	
Streamlining Broadcast EEO Rules and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines	)	MM Docket 96-16

To: Mass Media Bureau

JOINT COMMENTS

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BLADE COMMUNICATIONS, INC.
COSMOS BROADCASTING CORPORATION
COX ENTERPRISES, INC.
FIRST MEDIA TELEVISION, L.P.
GREAT EMPIRE BROADCASTING, INC.
IMS BROADCASTING, LLC
NEW CENTURY SEATTLE PARTNERS, L.P.
PAXSON COMMUNICATIONS CORPORATION
PRETTYMAN BROADCASTING COMPANY
SIMMONS NEW MEXICO, INCORPORATED
SIMMONS FAMILY, INCORPORATED
TAK COMMUNICATIONS, L.L.C.
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SUMMARY OF ARGUMENT

The Joint Parties are committed firmly to non-discrimination in employment and the Commission's goal of increasing opportunities for participation of women and minorities in the broadcasting industry. Reflecting their commitment, the Joint Parties aggressively have implemented effective hiring, recruitment, training, record-keeping and promotion procedures to maximize these opportunities at their stations.

The Joint Parties submit, however, that the jurisdictional basis of the Commission's EEO rules is narrow, grounded in the assumption that a broadcaster can more effectively fulfill the public interest if it makes a good faith effort to hire minorities and women. The FCC's current EEO rules and record-keeping requirements have broken free from this jurisdictional mooring: the Commission has, in practice, become an EEO enforcement agency. The Commission's EEO mandate does not extend this far and its rules must be honed to more accurately reflect the limited scope of its jurisdiction.

With this over-arching principle in mind, the Joint Parties here address six principal issues raised in the Notice of Proposed Rulemaking.

Relief for Qualifying Stations: The Joint Parties suggest that the Commission extend to "qualifying" stations the EEO relief provided under the current rules to stations that employ fewer than five full-time employees. "Qualifying" stations would remain generally subject to 47 C.F.R. § 73.2080 and would file

FCC Form 395-B annually, but would not be required to file EEO program reports as part of their renewal application. In addition, in order to eliminate statistical distortions possible in evaluating the EEO performance of small stations and stations in MSAs with low minority labor forces, the Joint Parties suggest that the Commission treat such stations as qualifying stations or, at a minimum, permit them to submit annual employment data based on an "average" employment profile for the year rather than based on one particular pay period.

The Joint Parties also urge the Commission to eliminate all recruitment, record-keeping and review requirements for part-time employees.

Defining Qualifying Stations. The Commission should adopt a three-prong test for "qualifying" stations: stations meeting any one prong would qualify for the streamlined EEO treatment discussed above. Stations with 12 or fewer full-time employees would qualify, as would any station in an MSA (or alternative labor force market) where the minority labor force is de minimis, that is, 12% or less. Additionally, a station with more than 12 full-time employees would qualify for EEO relief if it met a benchmark of 75% parity with the MSA minority and female labor for 6 of the 8 years of its previous license term (5 of 7 years for radio; 3 of 5 years for television under the current rules) both overall and in the upper four job categories.

Alternative Labor Force. There is no logical basis for the Commission's use of a station's MSA to determine its minority

labor force pool. Accordingly, the Commission should abandon the present alternative labor force test, which is virtually impossible to satisfy, and permit stations to use non-MSA labor force statistics whenever the MSA does not represent the station's actual service area, or if the station can establish, either through commuting patterns or evidence of current employee residences, that the MSA is not likely to be a practical or realistic source of its potential employees.

Joint Recruiting and Training Programs. The Commission does not "credit" stations that have significant minority or female training programs. Such programs often lead to full-time employment and provide an opportunity to for women and minorities to develop skills critical to further advancement in the broadcast industry. The Joint Parties therefore propose that stations which otherwise would be subject to a "letter of inquiry" during renewal for failure to meet the EEO processing guidelines, would be granted renewal if they have implemented a significant training program.

Forfeiture Guidelines. The Commission should continue to assess sanctions for EEO violations on a case-by-case basis and should not adopt the forfeiture guidelines proffered in the Notice. Adopting guidelines would restrict the Commission's ability to effectively balance EEO deficiencies against mitigating circumstances presented by a licensee.

In any event, the proposed guidelines are fatally flawed because they rely on a statistical analysis that does not reflect

the ultimate goal of the Commission's EEO requirement -- good faith efforts to attract minority and female job applicants. By adopting the guidelines, the Commission would elevate form over substance and would deviate from the jurisdictional basis of its EEO regulations.

Joint EEO Filing and LMAs. The Telecommunications Act of 1996 has rendered obsolete the 1994 Interpretive Ruling on joint annual EEO filing for co-owned or co-located radio stations. The Commission should permit a single joint filing for all co-owned or co-located radio stations in a market. This would provide a more realistic picture of a licensee's hiring practices and would eliminate the artificial requirement that licenses arbitrary allocate employees among co-owned or co-located stations. The Commission also should extend these changes to radio stations being operated subject to an LMA.

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To: Mass Media Bureau

JOINT COMMENTS

The parties listed on Attachment A (together, the "Joint Parties"), by their attorneys, submit these Joint Comments in response to the Commission's Notice of Proposed Rulemaking, MM Docket No. 96-16, FCC 96-49 (Feb. 16, 1996) ("Notice") in the above-captioned proceeding.

The Notice proposes numerous changes designed to streamline the Commission's EEO regulation and reduce the associated record-keeping burden upon licensees of all sizes, albeit with particular emphasis on alleviating the burden on small or "qualifying" stations. The Notice also proposes to readopt the forfeiture guidelines first announced in 1994 but since vacated. Notice, FCC 96-49 at 22.

The Joint Parties wholeheartedly and without reservation support the fundamental policy goals of the Commission's EEO Rules: non-discriminatory employment policies and practices are, properly, bedrock licensee obligations. The FCC's current EEO enforcement, however, has lost sight of the fact that EEO

enforcement is not the agency's primary function,[1/] and that this agency's jurisdiction over the employment practices of its licensees is narrow.

The FCC's current EEO compliance requirements are burdensome and time-consuming, especially in light of the reality that, as the Commission has recognized, most stations already comply with the EEO Rules. The Joint Parties' suggestions accordingly focus on alleviating the current record-keeping burdens for stations that already comply with the FCC's substantive EEO rules; encouraging innovative methods of reaching potential minority employees; and restructuring the rules to more accurately reflect the realities of station employment practices.

Specifically, the Joint Parties agree that qualifying stations should no longer have to maintain job-by-job EEO records. In particular, stations with 12 or fewer full-time employees; stations whose MSA (or other recruitment area) minority labor force is below 12%; and stations whose full-time minority and female employment was at least 75% parity with labor force representation both overall and in the upper four job categories, for 75% of their previous license term should qualify for reduced regulatory burdens. The Joint Parties also suggest

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1/ The Equal Employment Opportunity Commission is the primary federal guardian of employment relations. Indeed, its jurisdiction is sweeping. It encompasses all companies which employ 15 or more persons, 42 U.S.C. § 2000e (1996), thereby including most FCC licensees. See generally 42 U.S.C. § 2000, et seq (implementing broad anti-discrimination laws under Civil Rights Act of 1964).

that stations should receive substantive "credit" for minority training programs and internships.

The Joint Parties propose that the Commission permit a station to use alternative labor force data whenever the station's MSA does not reflect the station's realistic, practical recruitment area.

The Joint Parties object to adoption of the proposed forfeiture guidelines. Implementing the guidelines would displace the FCC's reasoned analysis of the need for and appropriate scope of any EEO sanctions with rote application of statistical benchmarks that are at odds with the underlying goals of affirmative action and are based on faulty statistical premises.

Finally, the Joint Parties ask the Commission to establish rules and policies for simplified EEO filings by co-owned and co-located stations and stations being operated pursuant to local management agreements ("LMA"s).

I. BACKGROUND.

One over-arching principle must guide the FCC's revision of its EEO rules: the FCC is not

> charged with an undifferentiated mandate to enforce the anti-discrimination laws: the FCC is not the Equal Employment Opportunity Commission [], and a license renewal proceeding is not a Title VII suit.

Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 628 (D.C. Cir. 1978). As the federal courts and the Commission itself repeatedly have stressed:

> EEO enforcement is not the FCC's mission. Thus, it has no obligation to promulgate EEO regulations. But it does possess the power to issue such regulations in furtherance of its statutory mandate to ensure that broadcasters serve all segments of the community.

Office of Communication of the United Church of Christ, 560 F.2d 529 (2d Cir. 1977) (emphasis added).

The principal goal of the FCC's EEO rules is to "promote program diversity." EEO Notice of Inquiry, 9 FCC Rcd 2047, 2049 (1994) ("Notice of Inquiry"). The FCC's EEO requirements are thus grounded in the FCC's belief that "a broadcaster can more effectively fulfill its duty to serve the needs of the entire community if it makes a good faith effort to employ qualified women and minorities " Notice, FCC-96 at 3. The FCC, therefore, must review and regulate the employment practices of a radio or television licensee only

> to the extent those practices affect the obligation of the licensee to provide programming that "fairly reflects the tastes and the viewpoints of minority groups," and to the extent those practices raise questions about the character qualifications of the licensee.

NOW v. FCC, 555 F.2d 1002, 1017 (D.C. Cir. 1977) (quoting NAACP v. FPC, 425 U.S. 662, 670 n.7 (1976)).

The FCC's current, detailed regulation of licensees' employment practices clearly exceeds the narrow jurisdictional basis for EEO regulations. Not only has the FCC gone beyond regulations needed to ensure representative programming: it duplicates extensive state and federal laws that already prohibit unlawful discrimination in the workplace generally, and intrudes upon the jurisdiction of those state and federal agencies with

primary EEO enforcement jurisdiction and expertise. See n.1, supra. The FCC should take the opportunity presented by this proceeding to reduce the detailed, often duplicative record-keeping burdens it imposes on broadcast licensees, with a particular eye toward eliminating the record-keeping burden for smaller stations.

The FCC has acknowledged that only 20% of stations filing EEO programs even are sent inquiry letters at renewal, and that only 4% receive reporting conditions and/or fines. Notice of Inquiry, 9 FCC Rcd at 2049. In other words, 96% of all radio and television station renewal applicants comply fully with the current EEO requirements. Given this extraordinarily high rate of compliance under the Commission's current EEO rules, the FCC should refocus its EEO regulations to concentrate enforcement on those stations which do not comply, while freeing from onerous regulations those that do.[2/] With these concepts in mind, these Joint Comments address six of the principal issues raised by the Notice.

2/ In light of the high compliance rate and the current budgetary constraints under which the FCC is operating, reducing the regulatory burden also would be fiscally prudent for the Commission itself.

II. DISCUSSION.

A. The FCC Should Exempt "Qualified" Stations From Job-by-job Record-keeping And Review Requirements And Adopt An Expansive Definition Of "Qualified" Station.

1. Substantive Relief To Qualifying Stations.

The FCC has offered two separate proposals by which it would grant EEO record-keeping relief to qualified stations. The Joint Parties propose that the Commission should extend the EEO reporting and record-keeping relief currently afforded stations with 5 or fewer full-time employees under the present rules to all "qualified" stations. These stations would remain generally subject to 47 C.F.R. § 73.2080 and would file FCC Form 395-B annually, but they would not file EEO program reports during renewal.

The Joint Parties also propose that qualifying stations[3/] would submit annual employment data pursuant to the pay period system devised by the FCC as they do currently. But, if a station believes that a particular pay period is not representative of the station's overall EEO record for the year, the station would have the option of tabulating and submitting an "average" employment profile for the year, based on station employment on a given date each month. This extended snapshot of the station's employment profile would lessen the impact of the departure (or addition) of a minority or woman. It also would

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3/ The Commission also could offer this option to small stations (12 or fewer full-time employees) where the addition or loss of a single minority or female employee may have a substantial disparate impact.

provide a more comprehensive view of the station's EEO compliance record by focusing on a greater frame of time, while promoting more effective compliance through a monthly review of the station's employment profile.

2. **Defining "Qualified" Stations.**

Currently, all broadcast stations with more than five full-time employees are subject to the time-consuming and paper-intensive EEO requirements. Stations must annually, and at renewal, submit detailed EEO compliance information. See 47 C.F.R. § 73.2080(c)(1)(i)-(iv) (recruitment and job posting), (c)(2)(i)-(v) (recruitment and job posting at minority-oriented locations and institutions), (c)(3)(i)-(ii) (self-evaluation of statistics), (c)(4)(i)-(ii) (promotions), (c)(5)(i)-(iii) (self-evaluation of program). The Notice proposes to reduce the substantive and record-keeping burden for "qualifying" stations, i.e., those stations which after meeting certain factors, would be deserving of simplified EEO compliance methods. Specifically, the Notice seeks comment on which factors should be used to determine "qualifying" stations.

The Joint Parties believe that stations which meet any one of the three following tests should be considered as "qualifying." First, all stations employing 12 or fewer full-time employees[4/] would qualify for the reduced EEO record-keeping requirements as outlined above. A 12-employee minimum would

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4/ See discussion of part-time employees, infra, at 14.

reflect the practical reality that licensees with 12 full-time employees unquestionably are not "large" stations. For example, in 1994, there were 3991 stations with five or more employees. These stations employed 145,645 people, an average of 16.19 employees per station.[5/] A 12-employee station is thus well below an average station.

The EEOC, the federal agency charged specifically with enforcing federal employment discrimination laws, exempts all businesses with 14 or fewer employees. 42 U.S.C. § 2000e. It is nonsensical that the FCC, with its narrow EEO jurisdiction, should require burdensome reporting and record-keeping from businesses that even Congress and the EEOC believe are too small to warrant coverage.

Furthermore, stations with fewer than 12 full-time employees often must stretch their limited resources and person-hours to comply with the present regulatory requirements. The FCC recognized as long ago as 1976 that such a station:

> generally [has] little need for written guidelines for initial employment, for later advancement, or for wage increases. In view of its smallness, such a business does not normally have the resources to develop formal personnel procedures, including the development of standardized job descriptions and objective -- rather than purely subjective -- employment criteria.

5/ This number does not include stations being operated pursuant to an LMA where the brokering entity was not a licensee and was not required to file an annual EEO Report. See Notice, FCC 96-49 at 11-12 n.34.

Non-discrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226, 240 (1976) ("Non-discrimination Order").[6/]

The importance of relief for these stations cannot be underestimated. Currently, all licensees must contact varied referral sources for each job opening, both full- and part-time. Although the Rules contain no express record-keeping requirement, the FCC nonetheless expects that licensees to record and review the race, gender, and referral source of every applicant, every interviewee, and every hire for every job vacancy. See Tri-Valley Broadcasters, Inc., FCC 96-144 at 2 (Apr. 24, 1996) (station not permitted to use alternative labor force because it did not document all of its referrals, interviews and hires). Indeed, the FCC routinely sanctions stations for failure to maintain detailed hiring data. The Kravis Company, FCC 96-175 (Apr. 25, 1996) (station sanctioned for not keeping complete records of applicants, interviewees, and recruitment sources contacted); Stauffer Communications, Inc., 10 FCC Rcd 5060 (1995) (same).

Sanctioning stations for violating this onerous (but de facto) record-keeping requirement is unreasonable and unfair. The record-keeping requirement itself overwhelms smaller stations

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6/ The Second Circuit vacated this decision as arbitrary and capricious but did not dispute that with proper justification, the FCC's EEO changes would have been upheld. Office of Communication of the United Church of Christ, 560 F.2d 529 (2d Cir. 1977).

both economically and in terms of employee-hours expended. For example, one Joint Party notes:

> The sheer volume of paper generated in EEO tracking is onerous. It is not uncommon to have upwards of 200 applicants for certain high visibility positions. Assuming each inquiry produces, at minimum, 6 pieces of paper -- cover letter, 1 page resume, initial acknowledgment letter, application, EEO data form, final response letter -- the completed recruiting file will contain 1000 sheets (2 reams) of paper, plus control pages, which must be handled by support staff several times, at least once by the interviewer, and twice by the EEO compliance officer. It imposes a heavy burden on departments with high turnover and little or no support personnel (News and Production).

As reflected by these observations, stations forced to comply with the job-by-job recruiting requirements effectively must have an employee whose sole job is to manage and review EEO compliance. At a small station, where that employee would be expected to perform other significant and critical station functions, the burden of compliance is enormous.

The monetary cost of compliance is also disproportionate to the benefits received. The situation described above -- one job opening -- cost the station several hundred dollars in copying and postage alone, not to mention the non-monetary cost of having an employee draft and mail repeated letters to recruiting sources and applicants and maintain the files. Small stations simply cannot afford these expenses.

Stations with fewer than 12 employees also are susceptible to distortions in their EEO compliance records. Specifically, the presence or absence of a particular minority or woman employee on a small station's employment record often will mean

the difference between compliance with the processing guidelines and a lengthy investigation. Exempting such stations would protect these stations from being penalized for generally not having enough employees to nullify statistical variances.

A 12-employee also is in line with previous FCC proposals for "small" station EEO relief. In the Non-discrimination Order, the FCC adopted 10 full-time employees as the demarcation point for small stations, and the instant Notice also suggests 10 employees as a viable dividing line. While more than half of the broadcast stations nationwide would be exempt from full EEO regulation under the Joint Parties' proposal, most stations in the largest markets, where there are more concentrated minority populations, would remain subject to the stricter EEO requirements.[7/]

The FCC has recognized that only 20% of stations filing EEO programs even are sent inquiry letters at renewal, and only 4% receive reporting conditions and/or fines. Notice of Inquiry, 9 FCC Rcd at 2049. Given this extraordinarily high -- 96% -- compliance rate, there is substantial independent justification for raising the "qualifying" station limit from 5 to 12 full-time employees in order to exempt the majority of stations that already comply with the Commission's EEO Rules.

Second, all stations, regardless of size, would "qualify" for reduced EEO record-keeping requirements if the qualified

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7/ The 10 employee limit adopted by the Non-Discrimination Order also exempted more than half of the stations nationwide. 60 F.C.C.2d at 240.

minority labor force in the licensee's MSA, county, or alternative labor force is below 12%. In 1995, minorities comprised 24.6% of the national labor force, while women comprised 46.0% of the labor force. 1995 Broadcast and Cable Employment Report, June 12, 1995. Accordingly, MSAs with only a 12% minority labor force would have less than half the national average of minorities. These locations should be considered to have a "de minimis" minority labor force for recruiting purposes.

Permitting stations that have such a "de minimis" minority labor population from which to hire minority employees to be exempted from full EEO record-keeping burdens would ensure that stations will not be sanctioned for failure to recruit minorities (and to achieve statistical processing guideline parity) where the deficiency stems not from the licensees' efforts but from the lack of an abundant minority employee pool.

Employment statistics for stations in such markets are, in practice, meaningless in assessing EEO compliance. The Commission recognized this statistical meaninglessness in the 1976 Non-discrimination Order:

> This [statistical uselessness] is exemplified by the case of the station employing eight full-time employees, none of whom is a minority, in an area where minorities constitute ten percent of the labor force. In such a situation, parity employment could be achieved by employing a fraction of one minority.

60 F.C.C.2d at 241. Where total compliance with the "minority" category would require hiring only a fraction of an employee, stations should not be required to comply with the FCC's onerous record-keeping requirements.

Third, the term "qualifying station" would be extended to include stations with more than 12 full-time employees that met a benchmark of 75% parity with the MSA minority and female labor force for 6 of the 8 years (5 of 7 years for radio stations; 3 of 5 years for television stations under the present rules) of its previous license term. Conditioning exemption from EEO record-keeping requirements on this benchmark would provide a powerful incentive for compliance at levels far exceeding the FCC's current EEO processing guidelines.

The Joint Parties agree with the Notice that in the absence of unlawful discrimination, stations meeting this benchmark should be found in presumptive compliance with the EEO Rule and not subject to record-keeping requirements.[8/] The Notice also correctly reasons that stations' whose employment profiles bear a reasonable relationship to the local workforce should be presumed to have engaged in adequate minority recruitment and outreach. Notice, FCC 96-49 at 13-14.

Requiring a station to meet the 75% benchmark for 75% of the license term will guarantee that the Commission's effort-based EEO rules will not be undermined by reliance on static hiring patterns. Stations often have a high employee turnover rate. See The Kravis Company, FCC 96-175 at 1, ¶ 4 (Apr. 25, 1996) (50

8/ Because prevention of unlawful discrimination is within the jurisdiction of state and federal EEO entities, parties petitioning to deny a station which has met the benchmark only would be permitted to raise the unlawful discrimination issue following a determination of discrimination by a court or agency charged with primary EEO enforcement responsibilities.

full-time vacancies in 3 years); Texas Coast Broadcasters, FCC 96-23 at 2, ¶ 10 (Feb. 6, 1996) (43 full-time job openings in 3 years). Thus, to achieve 75% processing parity, stations would have to actively and continuously recruit qualified minority applicants for full-time station employment. In short, the proposed benchmark rule would reward stations whose recruitment efforts have been successful, while providing significant incentive to other stations to improve their minority recruiting.

3. **Part-time Employees**.

The Joint Parties strongly believe that the FCC should not require stations to keep recruiting and hiring records for part-time employees. The burden and cost of the extensive record-keeping requirements and filing of Form 395-B for part-time vacancies overwhelms the benefits received. See supra at 8-10.[9/] Further, neither the Commission's proposed forfeiture guidelines nor the current 50/50 processing guidelines include part-time employment in considering a licensee's compliance with the EEO Rules. Notice, FCC 96-49 at 21. Finally, recent EEO cases and inquiry letters have focused only on hiring information for full-time employees. First Greenville Corporation, FCC 96-247 p. 1 (June 12, 1996) ("First Greenville had engaged in outside recruitment for only 16 of 67 full-time vacancies"); WHJB

9/ Indeed, maintaining records for part-time employees in accordance with FCC rules is even more burdensome than maintaining records for full-time employees because those employees tend to have high turnover rates, thereby generating more paperwork and more hiring situations.

Corporation, FCC 96-244 p. 4 (June 13, 1996) ("inquiry responses reveal that the licensee filled 20 full-time, including 14 upper-level vacancies"). Exempting part-time employees from recruitment and record-keeping requirements would thus be fully consistent with the FCC's EEO enforcement.

Requiring extensive record-keeping and review procedures for part-time employees also reduces the benefits of maintaining such positions. Part-time employment provides a golden opportunity for stations to hire minorities and women who may not have the experience necessary to warrant full-time employment, but who also may not qualify for a training program. Stations surely deserve credit for providing these employment opportunities. Requiring record-keeping and imposing minimum recruitment figures with penalties for non-compliance, however, is counter-productive.

B. The FCC Should Revise Its Rules To Grant Substantive EEO Relief To All Stations Through Credits For Training Programs And Expanded Use Of Alternative Labor Force Data.

1. Alternative Labor Force.

The Commission requests comment on proposals to permit use of alternate labor force statistics in analyzing a station's EEO record. Presently, a licensee may have its EEO record evaluated by reference to an alternative labor (other than its MSA) force only if it demonstrates (1) that recruitment efforts directed at minorities in the MSA have been fruitless; (2) the distance from the areas with significant minority populations is great; and (3)

commuting from those areas to the station is difficult. To meet the threshold requirement, a licensee must show (through almost perfect records) that it was unable to obtain qualified minority applicants from areas of minority concentration in the MSA despite extensive recruiting. Gulf Atlantic Media Corp., 72 R.R.2d 10, 12 (1993).

The Commission rarely has permitted stations to measure EEO compliance through alternative labor force data, even though there is no logical connection between the use of MSA data to define minority labor force population and the Commission's justification for its EEO regulations. The Joint Parties accordingly propose that the Commission abandon the existing alternative labor force test.

In its place the Commission should adopt a test that permits use of alternative labor force statistics whenever a station's MSA does not realistically reflect its service area. The Joint Parties' proposed test also would permit use of non-MSA statistics whenever the station can demonstrate that, in light of commuting patterns and the present residences of its employees, it cannot reasonably be expected to draw employees from the entire MSA.

The FCC historically has offered little justification for selecting the MSA as the basis of the relevant EEO labor pool. Until 1974, the FCC routinely deferred to licensees' determinations concerning the relevant labor market, Non-discrimination in Employment Practices of Broadcast Licensees, 23

F.C.C.2d 430, 433 (1970) ("the licensee is in the best position to know the minority population in the service area and respond accordingly."), although it occasionally referred to MSA statistics in addition to the station's city of license and service area. RadiOhio, 38 F.C.C.2d 721, 746 (1973), aff'd sub nom., Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C. Cir. 1974). The FCC explicitly adopted the MSA as the measure of the relevant labor market in United Church of Christ, 44 F.C.C.2d 647 (1974). Significantly, it adopted that measure as the most accurate estimation of the station's "entire service area." Id. at 652. The Commission's subsequent reliance on MSA statistics has been justified by reference to unspecified "past practice." Non-Discrimination Order, 60 F.C.C.2d at 236.

MSAs, however, are not defined with reference to a station's service area or programming obligations. Rather, MSAs are determined by the Office of Management and Budget, and are defined on several criteria, primarily population. Revised Standards for Defining Metropolitan Areas in the 1990s, 55 Fed. Reg. 12154 (Mar. 30, 1990). Conversely, the broadcasting EEO requirements are grounded in the FCC's rationale (and jurisdictional limit) that "a broadcaster can more effectively fulfill its duty to serve the needs of the entire community if it makes a good faith effort to employ qualified women and minorities." Notice, FCC-96 at 3. See also Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.2d 766, 770 (1968) ("A refusal to hire [blacks] or persons of any race or

religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with [black] community leaders concerning programming to serve the area's needs and interest.").

Indeed, the alternative labor force test suggested by the Joint Parties (focusing on a station's service area) is arguably mandated by the Commission's multiple ownership rules. In Revision of Radio Rules and Policies, 7 FCC Rcd 6387, 6395 (1992), the FCC adopted a service contour-based definition of "radio market" for its multiple ownership rules, specifically rejecting its prior adoption of an MSA-based standard:

> We believe that the use of this station counting method will address our core concerns of competition and diversity. We are convinced . . . that this revised measure will reflect the actual options available to listeners and will reflect marketing conditions facing the particular stations in question.

Given that the fundamental premise of the FCC's regulation of broadcast licensees' employment practices -- stations' public service programming obligations to their listeners -- is the same as the rationale for the Commission's service area-based multiple ownership rules, it is arbitrary and capricious for the Commission to use MSA statistics for its EEO enforcement rules.

A station's MSA often does not duplicate its actual service area. For example, many stations are located in single county MSAs, but actually serve (and recruit employees from) other counties (e.g. Miami MSA is Dade County but Broward and Dade Counties truly represent the listening population of any Miami

station). Similarly, lower powered stations or stations located on the fringe of an MSA may not serve an entire MSA. In either situation, the MSA bears no relationship to a station's service area, even though program service is the predicate for the FCC's EEO jurisdiction. It is thus arbitrary and unreasonable to require use of MSA statistics in these situations.

It is equally unreasonable to require such use in situations where the MSA does not accurately reflect the area in which stations actually recruit and hire employees. This is especially important where a station is located on the fringe of, but within, an MSA, and its signal does not reach the central city comprising the MSA, or where a station has offices located outside an MSA. In such situations, the distance from the central city to the station in question may make it highly unlikely that many people, including minorities would commute to the outlying station.

The FCC's extant test for alternative labor force must be replaced because it is focussed too heavily on performance indicators. Currently, a licensee only may use alternative labor force data if can prove that its minority recruitment efforts have been fruitless due to the distance minorities would have to travel for employment. This test is too restrictive and "whipsaws" licensees. A station may only attempt justify use of alternative labor force data when minority recruiting in its MSA has been fruitless. The Commission, however, rarely grants permission to use this data.